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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 452

THE VILLAGE OF SKOKIE, ILLINOIS,
Petitioner,

vs.

THE FIRST NATIONAL BANK AND TRUST COMPANY, OF RACINE, WISCONSIN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE FIRST NATIONAL BANK AND TRUST COMPANY, OF RACINE, WISCONSIN,
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ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STATEMENT.

The summary statements submitted by petitioner in its petition for a writ of certiorari seek by skeletal presentation of the proceedings before the Special Master and by faulty analysis of the opinion of the Court of Appeals, to create a receptive climate for its arguments. The basic issue in this case, as was stated by the Court of Appeals, is "Did the defendant Village collect some of the assessments levied under local improvement No. 60610 in cash, and if so, how much?" (Tr. 1186.) The Special Master found that petitioner had collected cash for the benefit of bondholders and computed the amount due to respondent as its pro rata share of these collections. The Court of Appeals found that there was ample evidence to sustain the findings of the Special Master and that they were not clearly erroneous.

THE BASIS USED FOR JURISDICTION IN THIS COURT IS ERRONEOUS.

The basic issue in this case having been decided by the Special Master, the Court of Appeals had to determine whether or not the findings of the Master were clearly erroneous. There is no question before this Court as to a conflict with local law. Excerpts from the leading case in Illinois clearly demonstrate that where cash has been collected on a special assessment, the municipality is liable if it does not pay the bondholders. *Rothschild* v. *Village of Calumet Park,* 350 Ill. 330, 341:

> "The suit is brought to enforce its liability as trustee, to pay to the holders of the bonds the money which it received for that purpose, and it is the same, in effect, as an action of *assumpsit* for money had and received. * * * It is true that the Local Improvement act furnishes a complete code of procedure for the construction of local improvements by special assessment, from the initiation of the improvement to its completion and the collection of the money for its payment, but when the municipality which has made the improvement and collected the money to pay the bonds used in its construction fails in its duty to pay the bondholders, the latter may enforce their rights in accordance with the rules which prevail in other cases where money has been received to the use of another and retained without his knowledge.
>
> "* * * When the defendant in error had shown that the village collected the money applicable to the payment of his bonds and had not paid them, he had met the burden imposed upon him and was entitled to judgment unless the plaintiff in error showed a valid defense."

THE QUESTIONS PRESENTED DO NOT REFLECT THE ISSUES OF THIS CASE.

1. The Court of Appeals did not create a "trust accounting" theory of municipal liability. In the State of Illinois a municipality is a trustee to collect and distribute special assessment funds. *Village of Brookfield* v. *Pentis,* 101 F. 2d 516, 520 (C. C. A. 7, 1939); *City of Jacksonville* v. *Bankers Life,* 90 F. 2d 141, 143 (C. C. A. 7, 1937); *Rothschild* v. *Village of Calumet Park,* 350 Ill. 330 (1932); *Village of Dolton* v. *Harms,* 327 Ill. App. 107 (1945); *Friedman* v. *City of Chicago,* 374 Ill. 545 (1940). This was, and is the law in the State of Illinois, regardless of how long and earnestly the defendant may urge to the contrary.

The Court of Appeals did not hold that a municipality may incur general liability on special assessment bonds without affirmative proof of collections. On the contrary, the Court of Appeals agreed with the findings of the Special Master, that the petitioner had collected certain sums of money on the special assessment from which the respondent's bonds were payable, and that the petitioner was, accordingly, liable to the respondent for its proportionate share of those collections (Tr. 1190, 1191).

2. Neither the Special Master nor the Court of Appeals based petitioner's liability on "purely opinion evidence." But even were such the case, there would be no infirmity in the decision, as the applicable evidentiary rules authorize the introduction of opinion evidence in cases such as the one at bar. *United States* v. *Johnson,* 319 U. S. 503 (1943), 63 S. Ct. 1233; *People* v. *Gerold,* 265 Ill. 448 (1914).

3. The third question raised by the petitioner is entirely frivolous and does not require an answer.

THE REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT ARE INSUFFICIENT.

I.

The first reason presented by the petitioner misrepresents the opinion of the Court of Appeals and is phrased in terms calculated to mislead as to the issues actually decided by that Court. The Court of Appeals distilled the competing claims into this essence: "The critical questions are—did the defendant village collect some of the assessments levied under Local Improvement 60610 in cash, and if so, how much?" (Tr. 1186.) Answering this question in the affirmative, the Court of Appeals found that liability attached from the plain wording of the Illinois Local Improvement Act.

The first reason assigned by the petitioner contains this statement:

> "The decision in this case through the 'trust accounting' theory casts the burden of disproving collections on the municipality * * *."

This is a willful distortion of the plain language of the Court of Appeals which held that after collections had been proved,

> "* * * The burden was then upon the village to explain what collections were made and what was done with them." (Pet. Br. p. 43.)

At the risk of tedious repetition, we must again state that the Special Master found that the petitioner had collected certain sums in cash in payment of the special assessment from which the respondent's bonds were payable, and that it was entitled to its pro rata share thereof. The Court of Appeals held that his findings were not clearly erroneous,

but on the contrary amply supported by the evidence. In the case of *Fidelity Trust Co.* v. *Village of Stickney*, 129 F. 2d 506 (1942), to which the petitioner devotes roughly seven pages of its brief, the evidence discloses that the Village of Stickney had *not* collected certain portions of the special assessment. The Court of Appeals found that as to those funds which had never come into the possession of the Village it incurred no liability. Further discussion should be unnecessary. In the case at bar cash was affirmatively found to have been collected.

Emphasis is also placed on a statement, torn from context, to the effect that the Village would not be held liable for the default, neglect, or mistake of its agents. Where affirmative proof establishes that no trust fund is in existence, the statement is applicable. Under the circumstances of the instant case, where the findings are consistent only with the existence of the trust *res*, the statement has no relevance. One need look no further for authority than the same case from which the statement is taken; on page 510 of that opinion, the Court had this to say:

> "It seems clear to us that under the so-called first method by which money was collected by the collector of the Village, the Village is liable for the amount of money the collector received. This constituted a trust fund, for the integrity of which the Village was unquestionably liable."

The liability of a village or municipality is not dependent on neglect or misfeasance of its officers or agents but on the existence of the trust fund. In *People* v. *Village of Bradley*, 367 Ill. 301 (1937), the claimants were those who had installed the improvements. In the normal course of events such claims may only be satisfied from special assessment funds. The court there explained, pages 306, 307:

> "As the situation existed at the inception of the contracts between the contractor, subcontractors and the

> village, the liability was limited to the funds collected from the special assessment levied. The change in positions of the parties has been brought about by the default and misfeasance, if not malfeasance, of the village, acting through its governmental officials * * *. The money collected by the village from the special assessment levied to pay the cost of the improvement constituted a trust fund available to those having legal claims for materials furnished, or labor performed, in the course of construction of the sewer. * * * The law will not countenance the evasion by a village of its debt, by either its willful or negligent failure to apply towards the discharge of that obligation funds collected by it for the specific purpose of meeting such demand. * * *
>
> "We are not impressed with the argument that the village treasurer and not the village is the trustee of the funds."

Not only was the opinion of the Court of Appeals in full accord with local law, but it is impossible to discern how the holding could have been otherwise. Far from establishing the probability of conflict with applicable precedent, cases cited by the petitioner serve only to strengthen the position taken by the Court of Appeals. The fallacy of petitioner's argument is readily seen, for if the burden of explanation were placed on the trust beneficiary, a premium would then be placed upon the failure of a trustee to keep accurate records, or indeed, to keep any records at all.

II.

The second reason presented by the petitioner for allowance of the writ contains the unwarranted assumption that the judgment in the instant case was dependent only on opinion evidence. The District Court on September 14, 1943, ordered the petitioner to render an accounting. The Village attempted to evade this by stating, through its

counsel, that it owed the respondent $5,000.00 as its proportionate share of collections which were applicable to the bonds and coupons in question. The Special Master ruled that an accounting was still necessary in order to determine whether $5,000.00 or a greater sum was due to the respondent. After four successive statements of account made by the petitioner were found to be incomplete and inaccurate, the respondent was given leave to have a complete audit of all books and records in the Village relating to the special assessment in question.

The auditor employed by the respondent was Raymond S. Blunt, a certified public accountant and a member of the American Institute of Accountants, the Illinois Society of Certified Public Accountants, the Legislative Committee of Illinois, and of the Governmental Accounting Committee of the Illinois Society. He has had wide experience in municipal and governmental accounting, having examined the books and records of a number of counties and villages. He has audited more than 2,000 special assessment funds (Tr. 270, 271). He made an audit of the special assessment records on Special Assessment 60610 of the Village of Skokie commencing on March 18, 1947. He described his preliminary studies and the qualifications of the accountants he had assigned to assist him (Tr. 272). He was in control of all details of the audit procedure and in close contact with the work (Tr. 273). He examined the records of original entry including the 24,350 duplicate original receipted tax bills which were the first records made in the Collector's office of the payment of taxes; (Tr. 179, 180) he examined reports of the county collector and reports of the county clerk; he examined cancelled checks, cancelled vouchers, cancelled bonds and cancelled coupons (Tr. 275). He stated with infinite detail the method by which the audit was made (Tr. 275-279). Mr. Blunt first described respondent's Exhibit 1 of September

10, 1947 (Pl. Ex. Bk., p. 4) and explained the source of each computation shown thereon (Tr. 281-286). Respondent's Exhibit 2 of September 10, 1947 (Pl. Ex. Bk., p. 6) was likewise prepared by him, described, and the source of each calculation carefully related (Tr. 286-290).

Respondent's Exhibit 3 of September 10, 1947 (Pl. Ex. Bk., p. 11) is a summarized statement of all fund transactions from January 1, 1929 to April 30, 1947, resulting from his audit and examination of the books and records of the petitioner pertaining to Special Assessment No. 60610. Each page and heading of this exhibit, as well as the sources from which it was prepared is exhaustively described on pages 290 through 303 of the Transcript of Record. Mr. Blunt then stated that in preparing Respondent's Exhibit 2 of September 10, 1947 (Pl. Ex. Bk., p. 6) he used the information contained in respondent's Exhibit 3 of that date; in the preparation of said Exhibits 2 and 3, he used the entire assessment fund without breaking it down as to individual bonds in the schedules shown on these exhibits, so that they are based upon installment totals. In the preparation of respondent's Exhibit 1 of September 10, 1947, he took the information shown on respondent's Exhibit No. 3 as to totals and the summarization shown on respondent's Exhibit No. 2 and broke that down as to the individual bonds owned by the respondent in this case.

Due to a ruling of the Special Master that the respondent was barred by a former decree from recovering for any collections made prior to January 10, 1934, Mr. Blunt had to prepare other exhibits reflecting analyses of the records of the petitioner from January 10, 1934 to April 30, 1947. Respondent's Exhibit A (Pl. Ex. Bk., p. 22) is an analysis of the principal collections of this assessment from January 10, 1934 to April 30, 1947, which was prepared from the duplicate original receipted tax bills in the same manner except for the dates as respondent's Exhibits 1 and 2 of

September 10, 1947 (Pl. Ex. Bk., pp. 4, 6). Respondent's Exhibit B1 (Pl. Ex. Bk., p. 24) is an analysis of the interest collections for this assessment from January 10, 1934 to April 30, 1947, prepared from the duplicate original receipted tax bills and other Village records in the same manner as respondent's Exhibit 2 of September 10, 1947 (Pl. Ex. Bk., p. 6), except for the period covered.

Respondent's Exhibit B2 (Pl. Ex. Bk. p. 27) is a statement of the amounts claimed to be due the respondent in this case for interest collections made by the petitioner on this assessment from January 10, 1934 to April 30, 1947, and the method of computation conforms to the interest computations appearing on respondent's Exhibit 1 of September 10, 1947 (Pl. Ex. Bk. p. 4). Respondent's Exhibit C (Pl. Ex. Bk. p. 28) sets forth the amounts claimed to be due the respondent for principal, interest and interest on funds claimed to have been unlawfully withheld by the petitioner from January 10, 1934 to April 30, 1947. It was prepared from records of the petitioner for the purpose of setting forth as to each of the respondent's bonds the amounts due for principal, interest and interest on funds considered to have been unlawfully withheld. It consists of five pages (Tr. 1016 to 1017). The Master admitted respondent's Exhibits A, B1, B2 and C into evidence (Tr. 1037).

It is difficult to visualize a more thorough and complete foundation for exhibits than was given by the witness, Mr. Blunt. He identified each line of each exhibit, described what it represented and the source from which it was prepared. In each instance the basic foundation of these exhibits was the 24,350 duplicate original receipted tax bills which were the first record of collections made by the petitioner. In the instances where Mr. Blunt obtained his information from other Village records, he thoroughly described them and demonstrated that he had checked the

information against the original source, such as the duplicate original receipted tax bills (Plaintiff's Mass Exhibit 1). As was stated by the Master:

> "In all material respects the statements reported by Raymond S. Blunt, Sr. in connection with his audit of the Village records have not been contradicted or proven wrong by any evidence produced by the Village, although he was subjected to severe and exhaustive cross examination." (Tr. 1100.)

It is well settled that tabulations of voluminous documents in the form of schedules or summaries may be introduced for the aid of the court. *Augustine* v. *Bowles,* 149 F. 2d 93, 96 (C. C. A. 9, 1945); *Northern Pacific Ry. Co.* v. *Keyes,* 91 F. 47, 58 (C. C. N. D., 1898); *Rollins* v. *Bd. of Com'rs. of Rio Grande County,* 90 F. 575, 583 (C. C. A. 8, 1898); IV Wigmore (3d ed.) Section 1230 (1940). Section 1732 of Title 28 U. S. C. provides that writings and records made in the regular course of business are admissible in evidence in any court of the United States. This rule has been interpreted in *United States* v. *Freeman,* 167 F. 2d 786, (C. C. A. 7, 1948), as being applicable to the admission in evidence of statements prepared by an auditor from corporate records. To like effect is *United States* v. *Mortimer,* 118 F. 2d 266, 270, (C. C. A. 2, 1941).

This audit and the Exhibits herein described formed the basis for the Master's findings as to amounts collected, and thus due respondent.

As to the so-called opinion testimony, petitioner complains that Mr. Blunt stated that all of the bills shown in the Municipal records were first paid in cash and securities later substituted. Petitioner fails to inform this Court that this statement was adduced on cross-examination by its own counsel without objection or motion to strike the answers elicited.

Cross-Examination by Mr. Lyon.

(Counsel for Petitioner) (Tr. 372).

"Q. Do you wish to be understood as saying that all bills which bore the stamp 'Paid' were actually paid with cash?

A. I believe they were paid with cash, yes, sir. I believe securities were substitued after there was a payment of cash by the property owner.

Q. Would you say that was true on all bills?

A. I believe it was, sir.

Q. That includes those which you have classified as acceptable liquidations?

A. No, sir. In that case I don't believe it would. There were two such instances in which we found supporting evidence to indicate that the bill was paid with something other than cash."

On redirect examination of Mr. Blunt, following the above quoted extracts from the cross-examination, he was asked (Tr. 460):

"Q. Mr. Blunt, in cross-examination, I believe, in response to a question by Mr. Lyon you testified that it was your opinion that securities had been substituted for cash paid on these duplicate original receipted tax bills. Is that correct?

A. Yes, sir.

Q. Will you please explain your answer to the Court, please, and tell us on what you predicate that opinion?

Mr. Lyon: I object to that. The opinion was not an opinion to begin with, and on what he predicated the opinion is not a proper part of the record.

Mr. Short: Master, he opened up the question on cross-examination. I have a right, I believe, on redirect to answer that by further testimony in that regard.

The Master: Let him answer."

Whether it be fact or opinion of an expert, it is indisputable from the record that no objections or motions to

strike were made by petitioner's counsel when he chose to cross-examine on this subject matter. Although the cases uniformly authorize an expert witness to express an opinion on a subject matter within the province of expert testimony, that point was not before the trial court as this evidence was adduced by the petitioner and was not followed by a motion to strike. As was said in *Armstrong* v. *Chicago & Western I. R. Co.*, 263 Ill. App. 126 (1931), at page 144:

> "The rule on this question is that if one of the parties opens the way for the testimony objected to, there is no error in the admission of such evidence."

Again in *Doggett* v. *Greene*, 163 Ill. App. 369 (1911), at 378:

> "We are not convinced that the admission of this testimony was reversible error, nor that it did not fall within the principle stated by Greenleaf (vol. 1, sec. 468) and quoted by counsel, that 'If counsel chooses to cross-examine a witness as to facts which were not admissible in evidence, the other party has a right to examine him as to the evidence thus given.' "

To like effect are *Morton & Co.* v. *Zwierzykowski*, 192 Ill. 328 (1901), 332; *Greenleaf's Lessee* v. *Birth*, 30 U. S. 132, 137, 8 L. Ed. 72, 74 (1831).

It seems rather unusual for this petitioner to seek a reversal of the Court of Appeals' judgment because of a statement obtained by its counsel on cross-examination. Petitioner's counsel argued before the Master that this statement was not an opinion and yet now urge that it should have been excluded on the grounds that it was. The accuracy of this statement by Mr. Blunt was not challenged by any evidence of the petitioner.

Further criticism is made by petitioner of the use by Mr. Blunt of such phrases as "acceptable liquidations," "unacceptable liquidations," and "improperly issued ob-

ligations." The first instance of the use of the phrase "acceptable transaction" occurred on page 328 of the Transcript of Record:

> "Mr. Blunt: * * * This was an acceptable transaction because the name of the property owner was identifiable.
>
> Mr. Lyon: I object to whether it is acceptable or not.
>
> Mr. Short: It is acceptable to himself as an auditor.
>
> The Witness: This transaction was acceptable to us.
>
> The Master: By amending it, I think it is all right."

Following this amendment, no objection or motion to strike was made by petitioner's counsel. Mr. Blunt then used the word "determine" in an explanation (Tr. 329, 330):

> "Mr. Blunt: * * * we determined by such procedures that those bills were paid in cash and our report treats them as paid by cash.
>
> Mr. Wooster: I object to the conclusion of the word determined in there. How he treated it is all all right, but he determined that they were cash is objectionable.
>
> Mr. Short: I think that only goes to the weight. This is an expert witness.
>
> The Master: I understand the witness to mean when he says the word 'determined' that he is referring to his own work as an auditor. He classified them as cash.
>
> Mr. Wooster: With that understanding, I have no objection."

Again at Tr. 345:

> "The Master: Q. Do you mean when you used the term 'improperly issued obligation' that they were improperly issued according to your judgment?
>
> The Witness: A. Yes, sir.
>
> The Master: With that understanding, he may answer."

So once again we see that counsel for the petitioner, in this instance Mr. Wooster, had no objection after the witness explained that these phrases were used as a system of classification to describe how he treated the items in preparing his audit.

The cases cited by the petitioner as supporting its proposition that the admission of the Blunt testimony was in error do no such thing. Both cases involved jury trials wherein the question of fact to be decided was withdrawn from the jury by the expert's conclusion. Neither case approaches any factual similarity with the case at bar. In addition *Continental Casualty Co.* v. *First National Bank of Temple,* 116 F. 2d, 885 was decided in 1941, two years before this Court pronounced the rule in *United States* v. *Johnson,* 319 U. S. 503. *Smythe's Estate* v. *Evans,* 209 Ill. 376, was decided in 1904, but the Supreme Court of Illinois, in an opinion filed ten years later upon a factual situation comparable to that of the instant case, declared the Illinois rule in a manner strikingly similar to this Court's decision in *United States* v. *Johnson,* 319 U. S. 503. This was the case of *People* v. *Gerold,* 265 Ill. 448. It was a criminal prosecution of the City Treasurer of East St. Louis, Illinois, wherein *Gerold* was charged with taking credit for paying special assessment bonds and coupons after they had in actuality been taken up by his predecessor in office. An expert accountant, while on the witness stand, stated his method of reporting his conclusions from an examination of the books of the City, as follows (p. 459):

> "* * * I may state that the audit of bonds and coupons was based on the total amount of bonds authorized, which also showed payments of coupons that were *legitimately* issued. We also took into account the cash account that showed balances of unissued bonds. At that time we knew the amounts redeemed and the

> amounts outstanding, and we had the same information in respect to coupons, and the result of our examination *was that amounts had been paid in excess of the amounts issued and showed as redeemed.*" (Italics supplied.)

It is submitted that the accountant's statement of his result in that case is virtually the same as that of Mr. Blunt in the instant case. The Supreme Court of Illinois, on page 460 states:

> "Their principal objection is that the expert should not have been permitted to testify to his conclusions. Without discussing at length the various objections raised by counsel for plaintiff in error as to the admissibility of Ambrose's (the expert accountant) testimony, we deem it sufficient to say that we find no reversible error in the various rulings of the trial court on this particular subject. The weight of the testimony introduced by the State for the purpose of supporting the allegations under these twenty-six separate counts or liens, was a question for the jury." (Paraphrasing supplied.)

In *United States* v. *Johnson,* 319 U. S. 503 (1943), 63 S. Ct. 1233, *Johnson* had been indicted and convicted of defrauding the Government of income tax. An accountant testifying as an expert witness for the Government was permitted to give his conclusions as to *Johnson's* income. The question was whether the expert accountant had improperly testified on the "controverted" issue of the case. The witness was permitted to testify as to his computations of the gross income of *Johnson* for the year 1936. (Blunt, in the case at bar, was permitted to testify as to his computations of the gross receipts in cash by the petitioner as shown by the duplicate original receipts.) The witness in the *Johnson* case was permitted to testify as to his computation of the amount of tax still due the United States for the year 1936. (Blunt was permitted to

testify from his computations as to the amounts due respondent on its bonds calculated from the gross receipts.) The witness in the *Johnson* case had made these computations from the Government's Exhibits in evidence. (Blunt prepared his computations from the duplicate original receipted tax bills in evidence and other Village records.) (See *United States* v. *Johnson,* 123 F. 2d 111, 126, 127 (CCA 7, 1941.) This Court stated at page 519 that the effect of this testimony was not to withdraw any issue from the jury, nor was the correctness or credibility of any materials underlying the expert's answers even remotely foreclosed by his testimony. The same situation is present in the case at bar. All of the facts on which the expert Blunt's testimony was based were presented to the Special Master; all of the duplicate original receipted tax bills are in evidence; all of the books and records of the petitioner were available for use by it in the extensive cross examination its counsel made of this witness. This contention of petitioner is not only erroneous but expresses a concept already condemned by this Court in *United States* v. *Johnson,* 319 U. S. 503, 63 S. Ct. 1233 at 1240:

> "To require more meticulous proof than this record discloses that there were unreported profits from an elaborately concealed illegal business, would be tantamount to holding that skillful concealment is an invincible barrier to proof."

It is respectfully submitted that the test in a criminal case before a jury is far more strict than in a trial before a Master in Chancery conducting an examination within the purview of the Federal Rules of Civil Procedure.

Rule 43 (a) of the Rules of Civil Procedure for the United States District Court provides:

> "* * * In any case, the statute or rule which favors the reception of the evidence governs, and the evi-

dence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

Rule 53 (d) (3) provides:

"Statement of Accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the from of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs."

The Special Master's own statement in his Amended Report, discloses that he exercised the authority given him by the above rules, and directed the accounting in question: Tr. 1112:

"It was only from the audit directed by the Special Master, after the four unsuccessful and incomplete attempts of the Village to render a proper accounting that an audit was produced at great expense by the plaintiff to show, as far as possible, what the Village officials had done or failed to do in the premises."

In order to refute petitioner's bald misstatement that the only evidence in this record was opinion evidence of respondent's auditor, it is only necessary to summarize the instances in which petitioner's witnesses have agreed with the testimony of Mr. Blunt. Undeniably conclusive is the fact that the Village Treasurer's records of the 24,350 duplicate original receipted tax bills showed these transactions as cash receipts (Tr. 331).

The Village auditor admitted that the duplicate original

receipted tax bills were the first record of any collections of special assessments in the Village (Tr. 180).

Early in the hearings before the Special Master, petitioner was caught altering the Special Assessment Roll by adding the stamp "Paid with Village Securities." No testimony was offered to explain this, but petitioner's counsel stated that there had been no tampering with the original records, and that the alteration of the Special Assessment Roll was an attempt to make it conform with the duplicate original receipted tax bills, which are the original records (Tr. 34, 35, 39, 40). Mr. Blunt, respondent's auditor, having been informed of this alteration, indicated that perhaps the duplicate original receipted tax bills had likewise been altered (Tr. 463). This suspicion was borne out at the hearing of December 3, 1947, when petitioner's own witness, Mr. Chamberlain, on both direct and cross-examination, stated that the duplicate original receipted tax bills had been stamped "Paid with Village Securities" after the beginning of the litigation (Tr. 609, 632). In other words, the duplicate original receipted tax bills, being the original records, were altered, and then the Special Assessment Roll, being a memorandum of account, was altered to conform to the first alteration. Altering the thousands of duplicate original receipted tax bills and then conforming the thousands of corresponding entries must have been a time-consuming task, and may be the reason for some of the many continuances of the trial obtained by petitioner. Petitioner offered no explanation in any brief or oral argument as to why it presented no evidence to clarify this damning activity on the part of its officers. The inescapable conclusion is that when a bill was stamped "Received Payment," cash had been received at that time and the subsequent alterations made to conceal that fact.

The Village auditor admitted that neither the Collector's

Daily or Monthly Reports conformed with these duplicate original tax bills (Tr. 195-243). He admitted upon being shown specific examples that on the dates stamped on these bills reflecting payment no other Village record accounted for any receipt on said dates (Tr. 225). He admitted that in a number of instances pro rata payments were made on bonds claimed by the petitioner as credits against a group of tax bills paid earlier. He could not explain how a bond could be received and cancelled in payment of a tax bill on one date and then receive a pro rata payment on it months or years later (Tr. 198). He testified that the total of collections of the 2nd installment were all cash in the amount of $49,076.90.

Mr. Chamberlain, another accountant witness for petitioner repeatedly testified that petitioner's records disclosed receipt of securities on 2nd installment bonds (Tr. 586). Another series of examples of unaccounted cash receipts was adduced from Mr. Chamberlain relative to Receipts of Deposits for Redemption (Respondent's Exhibits 6 through 16, Pl. Ex. Bk. pp. 42-63). As is alleged in Par. 10 of Counts I and II of the Amended Complaint, parcels of land with delinquent special assessment taxes not withdrawn from sale by direction of the Village and not sold, were forfeited to the State in accordance with the Statute. Property owners desiring to redeem these lots or parcels of land paid their money and received in exchange Receipts of Deposit for Redemption, which state on their face that there had been deposited with the Village Collector a certain sum of money to redeem the lots described.

In the case of *Friedman* v. *City of Chicago*, 374 Ill. 545, decided on October 11, 1940, the Supreme Court of Illinois held that the 1939 Amendment of Section 89 of the Local Improvement Act, which permitted the use of securities as payment for Certificates of Re-

demption, was not applicable to previously issued bonds. Respondent's Exhibit 6 (Pl. Ex. Bk. p. 42) is a Receipt of Deposit for Redemption signed by the Village Collector of petitioner acknowledging receipt of the sum of $674.99 to redeem certain lots belonging to the Catholic Bishop of Chicago from forfeiture. This Receipt was dated January 12, 1942 (Tr. 669-677). The transaction of payment reflected by this Exhibit was not recorded in the Village books until September 16, 1943, twenty months later than the date it bore (Tr. 667). At this time, September 16, 1943, the Collector reported this transaction as having been paid with securities. Similar transactions with various ranges of dates, but all reported as having been paid with securities on September 16, 1943, are shown in Exhibits 7 through 16 inclusive (Pl. Ex. Bk. pp. 44-63). No evidence was offered by the Village to account for the sums of cash reported on these Certificates as collected or to in any wise explain either the discrepancy in dates of recordation on the Collector's books or the claimed credit of security receipts therefor. Obviously, it was illegal in January of 1942 to accept securities as payment for Certificates of Redemption. The Village was well acquainted with the case of *Friedman* v. *City of Chicago,* 374 Ill. 545 in 1942, since it was a party to the case entitled *Murray* v. *Village of Skokie,* 379 Ill. 112 (1942), decided on January 20, 1942, holding that certain practices by the Village in splitting bonds was an attempt to circumlocute the *Friedman* case. Most important is the fact that the Village prepared corresponding duplicate original receipted tax bills for these Certificates of Deposit for Redemption. Examples of these appear in Plaintiff's Exhibit Book pp. 43-63. Here are undisputed examples of duplicate original tax bills claimed by the petitioner to have been paid with securities on September 16, 1943, when they obviously were paid with cash on January 12, 1942.

Section 89 of the Cities and Villages Act, Chapter 24, Sec. 795 of the 1933 Ill. Smith-Hurd Rev. Stat., states:

> "Any property owner may pay his assessment wholly or in part, with the bonds or vouchers issued under this Act on account of such assessment, applying, however, the bonds and vouchers of such series only to the payment of the installments to which they relate. In making such payments, such vouchers and bonds shall be taken at their par value and interest accrued to the date of making such payment. All vouchers and bonds received in payment of such assessment shall be cancelled by the officer receiving the same as of the date of their receipt, and deposited with the Treasurer of the city, town or village issuing the same."

In can be readily seen from this Statute that three tests apply to the securities claimed as offsetting credits by petitioner from the total of duplicate original receipted tax bills. First: the property owner must be a bondholder; secondly: the bonds can only be used in payment of installments to which they relate; and third: all bonds must be cancelled as of the date of their receipt.

That portion of the Statute dealing with cancellation of the bond upon receipt of it as payment of an assessment was construed in *Friedman* v. *City of Chicago*, 374 Ill. 545, where the Court stated at page 550:

> "To cancel is to nullify, declare null and void; to set at naught the provisions of the instrument cancelled and to declare them null and void * * * cancellation of any form of contract necessarily includes a waiver of all rights under it by the parties."

As has been demonstrated by both the testimony of Mr. Blunt, and the admissions of Messrs. Moore and Chamberlain, petitioner's witnesses, the bonds claimed by the Village as credits bear perforated dates of cancellation differing from the dates of the duplicate original receipted tax

bills from several days to four years. In addition, many of these bonds received pro rata payments subsequent to the dates shown on the groupings of tax bills for which they were claimed as payment. No witness for petitioner explained how or why this was done. Obviously, it is prohibited by the statute to do aught but cancel the bond as of the date of its receipt in payment of a tax bill. If, therefore, the defense of the Village was that these bonds were received in payment of a tax bill on the date the tax bill was stamped paid, the only issue in this case would be under the alternative relief prayed for in Count II of the Amended Complaint, to-wit: Was this a valid payment of taxes? However, no scintilla of evidence was offered by the petitioner to this effect. The record presented by the petitioner on this question, is simply that the Collector reported the securities received on dates corresponding with the cancellation of the bonds which were from months to years later than the dates of payment of the tax bills. We submit that the conclusion reached by the Master relative to the alteration of the duplicate original receipted tax bills, was the only one upon which all reasonable men would concur after studying this record:

> "From the foregoing it appears that the alteration of the original records was made to conform with transactions within the Collector's office occurring after the date on which the collection was made." (Tr. 1106).

III.

The petitioner falsely asserts that the Court of Appeals treated its admission of $5,000.00 being owed as one of liability upon which the judgment was predicated. In the first place, the Court of Appeals expressly refused to pass on this contention and stated:

> "In as much as the defendant's liability to plaintiff has been determined by the special master upon the basis of an accounting, and such basis and the amount of liability are approved by this court, the judgment for $5,000 must be vacated and set aside. In view of our disposition of the entire controversy, we do not pass upon the contentions presented with respect to this phase of the litigation." (Tr. 1191.)

In the second place, the Special Master ruled that an accounting was necessary to determine whether or not $5,000.00 or more was due respondent (Tr. 1098). It was only after petitioner failed to accurately and fully account in four abortive attempts that respondent obtained leave to reopen its case and present a full and complete accounting. This accounting showed the actual money collected. Petitioner did not explain the errors and omissions found in its records through this audit, nor did it put in any evidence refuting these cash collections. Obviously this third reason of petitioner's is a woebegone attempt to confuse the issues before this Court.

CONCLUSION.

The record is replete with evidence supporting the Special Master's findings upon which the Court of Appeals commented with sparkling clarity. There is no conflict between this decision and the Illinois law. The situation is simply that a municipality occupying a fiduciary relationship with respondent sought, through Machiavellian alterations of its records, to conceal its liability for diverting funds collected by it. Fortunately for respondent, the duplicate original receipted tax bills were found and evidence adduced that they had been altered after the case commenced. From these duplicate original receipts, and despite their alteration, it was possible to show what actually had been collected. Petitioner stands convicted by its own Treasurer's records which showed the 24,350 duplicate original receipted tax bills as cash receipts. In the face of all this evidence, petitioner, its officers and employees, stood mute.

We respectfully urge that the petition for writ of certiorari be denied.

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